CONSTITUTIONALITY OF A LAW TO TAKE EFFECT ONLY AFTER RECEIVING A MAJORITY VOTE IN THE STATE.—Recent interest in the innovation of the principles of the initiative and referendum, and the political prominence of these movements, make interesting a new case on the question of whether under ordinary State constitutions a statute may be passed to take effect only on receiving a majority vote at a general election. In the recent case of *Hudspeth* v. *Swayze* (N. J.), 89 Atl. 780, such a statute was held to be constitutional, though there was some dissent. The former cases on the subject are reviewed and the conflict is recognized, the decision being based on grounds stated in former cases and also on the additional ground that when there are two recognized views as to the constitutionality of a statute, the authority of the legislature should rather be sustained. There is strong authority in favor of the constitutionality of such statutes,[1] and such seems to be the modern tendency. But other cases deny it on the ground that it is a delegation of legislative power.[2]

From the earliest times the validity of a law to take effect conditionally or only on the happening of a contingency, has been established, and the ascertainment of the happening of this contingency may be left to the executive authority.[3] But it would seem that the executive officer is not to be allowed any discretion as to what the law shall be; his sole duty is to find out if the contingency has happened.[4] Decisions in accord with the principal case are sometimes put on the ground that it is a law to take effect on the happening of a contingency;[5] but this seems a mere verbal quibble since in the case of contingent legislation it is the intent of the legislature that the law shall go into effect on the happening of some event casually connected with the need of such legislation, while allowing a popular vote on it is really allowing the people to enact the legislation.[6]

In the earlier cases so-called local option laws, by which it was left to the vote of a locality whether a general law passed by the legislature should be effective in that locality, were held unconstitutional as a delegation of legislative power. The case of *Parker* v. *Commonwealth*,[7] much relied on in these earlier decisions, was it-

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[1] Smith *v.* City of Janesville, 26 Wis. 291; State *v.* Frear, 142 Wis. 320, 125 N. W. 961; COOLEY, CONST. LIM., 7 ed., 168. See also, State *v.* Scampini, 77 Vt. 92, 59 Atl. 201. But in this last case it was only the question of when the statute should go into effect that was referred to the people. People *v.* Collins, 3 Mich. 343. In this case there was an equally divided court.

[2] Barto *v.* Himrod, 8 N. Y. 483, 59 Am. Dec. 506; State *v.* Hayes, 61 N. H. 264; Opinion of Justices, 160 Mass. 586, 36 N. E. 488, 23 L. R. A. 113. But in this case the dissenting opinion of Mr. Justice Holmes is the most suggestive.

[3] The Brig Aurora *v.* U. S., 7 Cranch (U. S.) 382.

[4] Field *v.* Clark, 143 U. S. 649.

[5] Smith *v.* City of Janesville, *supra.*

[6] Barto *v.* Himrod, *supra;* People *v.* Collins, *supra.*

[7] 6 Pa. St. 507, 47 Am. Dec. 480.

self overruled,[8] and it is now quite generally held that such laws are valid; as where a general law regarding the licensing of saloons is left to the vote of each county whether it shall take effect in that county;[9] and so with regard to a fence or stock law,[10] or the adoption of school districts.[11] Bnt even in recent years a few courts have held such laws unconstitutional.[12]

There seems no reason why a statute may not be dependent for its general effect upon a general popular vote as well as it may be dependent for its effect in a certain locality upon a vote in that locality. As said by Judge Cooley:[13] "If it is not constitutional to delegate to a single locality the power to decide whether it will be governed by a particular charter, must it not quite as clearly be within the power of the legislature to refer to the people at large, from whom all power is derived, the decision upon any proposed statute affecting the whole State? And can that be called a delegation of power which consists only in the agent or trustee referring back to the principal the final decision in a case where the principal is the party concerned, and where, perhaps, there are questions of policy and propriety involved which no authority can decide so satisfactorily and so conclusively as the principal to whom they are referred?" As a matter of fact the distinction is probably one of practical expediency; local option laws are upheld because they deal with questions which are dependent for their enforcement upon local public sentiment.

A question has arisen as to whether the provision in a State constitution allowing the initiative and referendum violates the United States Constitution, Art. 4, § 4, guaranteeing to every State a republican form of government. State courts have held there is no unconstitutionality.[14] The United States Supreme Court, relying on *Luther* v. *Borden*,[15] has refused to pass on the question, as it is political in its nature and has left solely to Congress.[16]

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[8] Locke's Appeal, 72 Pa. St. 491, 13 Am. Rep. 716.

[9] In re McGonnell's License, 209 Pa. St. 327, 58 Atl. 615; State *v.* Barber, 19 S. D. 1, 101 N. W. 1078.

[10] Cain *v.* Commissioners, 86 N. C. 8; Davis *v.* State, 141 Ala. 84, 37 So. 454, 109 Am. St. Rep. 19.

[11] State *v.* Cooley, 65 Minn. 406, 68 N. W. 66.

[12] State *v.* Weir, 33 Iowa 134; Wright *v.* Cunningham, 115 Tenn. 445, 91 S. W. 293.

[13] CONST. LIM., 7 ed., 168. A possible objection to this argument, as suggested in the principal case, is that counties may not have a representation in the legislature strictly according to population whereas in a popular referendum, a numerical majority of the voters of the State would control. Chancellor Walker answers this by saying that the measure has already been passed on by the legislature before it is submitted to the people. But the further point might be made that Judge Cooley's analogy of principal and agent is not a strictly true one, and might be applied to the judiciary as well as the legislature.

[14] Kadderly *v.* Portland, 44 Ore. 118, 74 Pac. 710, approved in Ex parte Wagner, 21 Okla. 33, 95 Pac. 435.

[15] Luther *v.* Borden, 7 How. (U. S.) 1.

[16] Pacific Telephone Co. *v.* Oregon, 223 U. S. 118; Kiernan *v.* Portland, 223 U. S. 151.